No. 91-7358

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In The

Supreme Court of the United States

October Term, 1991

TODD A. BRECHT,

Petitioner,

v.

GORDON A. ABRAHAMSON,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF THE STATES OF CALIFORNIA, ALABAMA, ALASKA, ARKANSAS, COLORADO, CONNECTICUT, IDAHO, INDIANA, KANSAS, KENTUCKY, LOUISIANA, MICHIGAN, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW JERSEY, OHIO, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, UTAH, VERMONT, WASHINGTON, WEST VIRGINIA AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

I. When the petitioner has had one full and fair opportunity to raise any *Doyle* claim in state court, should collateral review of the same claim on a federal habeas corpus petition be precluded?

II. Whether *Doyle* error should only result in reversal of a state criminal conviction on federal habeas corpus if the petitioner can demonstrate a reasonable probability of a more favorable result had the evidence been excluded?

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INTEREST OF *AMICI*

This case presents fundamental questions concerning the administration of justice implicated by the unique dual roles of our state and federal courts. Substantial but necessary costs are imposed during the direct review of alleged *Doyle* errors. This typically includes a complete review of the record to determine whether the State has met its burden to show that any established or presumed

error was harmless under the standard set forth in *Chapman v. California*, 386 U.S. 18, 24 (1967). Upon the conclusion of the direct review process, collateral challenges to the presumptively valid and final state court judgment raise other important criminal justice interests in finality, comity, and judicial economy. However, under current law, *Doyle* claims may be *relitigated* on federal habeas review. Since the States must bear most of the costs of federal habeas review, *amici* States have an interest in minimizing these costs by avoiding redetermination of *Doyle* claims in federal court where a full and fair opportunity to litigate has already been furnished in state court. *Amici* also have an interest in any standard of review adopted by this Court for the collateral review of *Doyle* claims.

This brief is submitted by *amici* through their respective Attorneys General in accordance with Rule 37.5 of the Rules of the Supreme Court.

STATEMENT OF FACTS AND PROCEEDINGS

On October 17, 1985, petitioner Todd A. Brecht shot his brother-in-law, who was the Wisconsin District Attorney for Buffalo County. Brecht contended the shooting was accidental. A jury found Brecht guilty of first degree murder. *Brecht v. Abrahamson*, 944 F.2d 1363, 1364 (7th Cir. 1991); *Brecht v. Abrahamson*, 759 F. Supp. 500, 502 (W.D. Wis. 1991). Brecht was sentenced to life in prison. At the state trial, four references to Brecht's post-*Miranda* silence were raised by the State, during cross-examination and closing argument. *See Brecht*, 944 F.2d at 1376; *Brecht*, 759 F. Supp. at 508. It is not disputed that these references violated *Doyle v. Ohio*, 426 U.S. 610 (1976), holding that the Fourteenth Amendment Due Process Clause forbids prosecutorial use of or comment on post-*Miranda* silence.

Following the trial, each successive state court on direct review and federal court on collateral review overturned the ruling or grant of habeas relief of the preceding court. The Wisconsin Court of Appeals reversed Brecht's conviction, concluding that the *Doyle* errors (along with other errors not in issue here) were not harmless. *State v. Brecht*, 138 Wis.2d 158, 405 N.W.2d 718, 722, 723 (Wis.Ct.App.1987). The Wisconsin Supreme Court reversed, reinstating the conviction after concluding that the due process violations under *Doyle* were harmless beyond a reasonable doubt. *State v. Brecht*, 143 Wis.2d 297, 421 N.W.2d 96, 104 (Wis.1988). The U.S. District Court granted federal habeas relief, holding, *inter alia*, that the *Doyle* errors did not constitute harmless error. *Brecht*, 759 F. Supp. at 508. The Seventh Circuit adopted a new standard for evaluating harmless error on collateral review: "whether the error 'had substantial and injurious effect or influence in determining the jury's verdict.' " *Brecht*, 944 F.2d at 1375 (citation omitted). In employing this standard, the Seventh Circuit found the *Doyle* errors were harmless and reversed the district court's grant of habeas relief. *Id.* at 1376. This Court granted certiorari review. *Brecht v. Abrahamson*, 112 S.Ct. 2937, 119 L.Ed.2d 563 (1992).

SUMMARY OF ARGUMENT

The narrow question presented in this case concerns the appropriate standard for federal habeas review of *Doyle* claims, which are relitigated *after* a presumptively valid and final state court judgment has been entered and a full and fair opportunity to litigate has been afforded on direct review.

In *Withrow v. Williams*, No. 91-1030, this Court will decide whether the standard under *Stone v. Powell*, 428 U.S. 465 (1976) – barring federal habeas review of Fourth Amendment exclusionary rule claims where there was a "full and fair opportunity" to litigate such claims in state court – should be extended to habeas claims based upon *Miranda v. Arizona*, 384 U.S. 436 (1966). The standard and rationale adopted and employed in *Withrow* may therefore control the disposition of this case.

Alternatively, and independent of this Court's resolution in *Withrow*, *amici* urge the Court to apply the rationale of *Stone* to *Doyle* claims. The *Doyle* rule does not confer a personal constitutional right, as it is a prophylactic, judge-made remedy designed to protect *Miranda* warnings and is not dictated by the Constitution. The primary purpose of *Doyle* is to promote fairness. Yet, this fairness function is sufficiently advanced under the direct review process, which includes a thorough examination of the record under the *Chapman* harmless error standard and the possibility of review by this Court. Any incremental benefit derived from *duplicating* this litigation on collateral review cannot be warranted in light of the material costs incurred, including to the criminal justice interests in finality, comity and judicial economy. Even assuming *arguendo* that a secondary probative function is advanced by the *Doyle* rule, the costs of *relitigating* a *Doyle* claim on federal habeas review cannot be rationalized after a defendant has already had a full and fair opportunity to litigate this issue in state court. The *Doyle* rule should be ardently applied on direct review. Any marginal benefits obtained from its application on collateral review cannot be justified.

If the Court declines to extend the rationale of *Stone* to *Doyle* claims, *amici* respectfully submit that the appropriate standard of review of *Doyle* claims may be borrowed from other due process cases which have focused on the reliability and fairness of the trial. Thus, *Doyle* error would result in reversal of a state conviction on collateral review only if the habeas petitioner can demonstrate a reasonable probability of a more favorable result had the evidence been excluded. This test would offer the benefits of: uniformity; the familiarity of an established standard; and ensuring the due process focus on the reliability and fairness of the trial.

ARGUMENT

I. This Case May Be Controlled By Standards Adopted By This Court In *Withrow v. Williams*

In *Stone v. Powell*, this Court held that Fourth Amendment exclusionary rule claims should be barred on federal habeas review "absent a showing that the state prisoner was denied an opportunity for a full and fair litigation of that claim at trial and in direct review." 428 U.S. at 495 n.37. In *Withrow v. Williams*, No. 91-1030, which will also be heard during the 1992 Term, the central question presented is whether the rationale of *Stone* should extend to claims alleging violations of the *Miranda* exclusionary rule, where a full and fair opportunity to litigate the claim has already been provided in state court. *See Miranda v. Arizona*, 384 U.S. 436 (1966). The disposition of this case may therefore be governed by the standard and rationale adopted by this Court in *Withrow v. Williams*, 112 S.Ct. 1664, 118 L.Ed.2d 386 (1992) (certiorari granted).

In *Brecht*, the Seventh Circuit expressly noted the possibility of extending the *Stone* standard to *Doyle* claims based upon the close relation between *Doyle* and *Miranda* claims. *See Brecht*, 944 F.2d at 1371-72 ("If *Miranda* ultimately joins the [Fourth Amendment] exclusionary rule, claims under *Doyle* are logical companions, for just as *Miranda* creates a buffer around the self-incrimination clause, so *Doyle* creates a buffer around *Miranda*."). However, instead of directly considering the extension of *Stone*, the Seventh Circuit adopted a modified harmless error analysis as a "middle ground." *Brecht*, 944 F.2d at 1373.

As noted by thirty-six States as *amici curiae* in *Withrow*, any incremental benefits of reviewing *Miranda* claims on collateral review are outweighed by substantial and unjustifiable costs to our criminal justice system. *See* Brief *Amicus Curiae* of States in Support of Petitioner, *Withrow v. Williams*, No. 91-1030, at 9-22; *see also Duckworth v. Eagan*, 492 U.S. 195, 212 (1989) (O'Connor, J., concurring) ("If *Stone v. Powell* bars relitigation of allegations of constitutional violations on federal habeas, it seems to me clear that its rationale is directly applicable to relitigation of nonconstitutional claims under *Miranda*."). As noted below, the existence of the *Doyle* rule is entirely dependent upon the *Miranda* rule. *See* notes 2 to 3, *infra*, and accompanying text. If in *Withrow* this Court extends the *Stone* standard to claims asserted under the prophylactic *Miranda* rule, then the *Stone* standard and rationale should similarly apply to claims based upon the prophylactic *Doyle* rule.

II. Independent of this Court's Disposition in *Withrow*, The *Stone v. Powell* Standard Should Extend To *Doyle* Claims

In *Greer v. Miller*, 483 U.S. 756, 765 n.6 (1987), this Court noted a significant open issue affecting the administration of justice: "whether *Doyle* errors may be viewed differently on collateral attack from on direct review." In the event the Court does not extend the *Stone* standard to *Miranda* claims in the *Withrow* case (i.e., *Withrow* is resolved on alternative grounds), then this case still presents an opportunity to resolve this open issue.[1] In answering the open question, a compelling argument can be made for the extension of the *Stone* standard to *Doyle* claims.

A. The Prophylactic *Doyle* Rule Does Not Confer A "Personal Constitutional Right"

One important facet of the *Stone* holding is that the Fourth Amendment exclusionary rule "is not a personal constitutional right" since it is a judge-made remedy "designed to safeguard Fourth Amendment rights." *Stone*, 428 U.S. at 486 (citation omitted); *id.* at 495 n.37; *see also Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986) (noting this "crucial" distinction made in *Stone*). The *Doyle*

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[1] Justice Stevens has already written that *Doyle* errors should be reviewed on direct review but has questioned whether they should be subject to collateral review. *See Greer*, 483 U.S. at 768-69 (Stevens, J., concurring). In *Brecht*, the Seventh Circuit also recognized some "deferential standard" is appropriate for collateral review of *Doyle* claims in order to avoid duplicating the litigation of claims already considered on direct review. *See Brecht*, 944 F.2d at 1372.

rule, a judicially-established standard intended to safeguard the *Miranda* warning, satisfies this part of the *Stone* opinion.

The role of the *Doyle* rule, premised on the Due Process Clause of the Fourteenth Amendment, can only be understood within the context of the *Miranda* exclusionary rule, based upon the Fifth Amendment. The opinions of this Court make clear that the *Doyle* rule is inextricably linked to the *Miranda* rule. This Court has "consistently explained *Doyle* as a case where the government had induced silence by implicitly assuring the defendant that his silence would not be used against him" through the *Miranda* warnings. *Fletcher v. Weir*, 455 U.S. 603, 606 (1982) (per curiam). Because "the 'implicit assurance' of *Miranda* warnings" serves as a recognized "*prerequisite* [for] a *Doyle* violation," *Greer*, 483 U.S. at 763 (emphasis added), it is indisputable that but for *Miranda* there would be no raison d'etre for *Doyle*. As the Seventh Circuit noted in *Brecht*, "*Doyle* is . . . a prophylactic rule designed to protect another prophylactic rule [*Miranda*] from erosion or misuse." *Brecht*, 944 F.2d at 1370.[2]

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[2] Other cases and commentators have discussed the direct dependence of *Doyle* on *Miranda*. *See, e.g., Wainwright v. Greenfield*, 474 U.S., 284, 290 (1986) ("The *source* of the unfairness [in *Doyle*] was the implicit assurance contained in the *Miranda* warnings. . . . The *critical importance* of the implied promise that is conveyed to the arrested person by the *Miranda* warnings has been repeatedly confirmed in subsequent decisions.") (emphasis added; footnote omitted); *United States v. Stubbs*, 944 F.2d 828, 834 n.1 (11th Cir. 1991) (noting "there can be no *Doyle* violation until after a person is given *Miranda* warnings and the assurances implicit therein"), *cert. denied*, 495 U.S. 959 (1990); *Grancorvitz v. Franklin*, 890 F.2d 34, 42 (7th Cir. 1989) ("Since the due process right established in *Doyle* is dependent upon the government giving assurances to an individual, such as those given under the *Miranda* warnings, the individual must be invoking the rights inherent in those assurances."), *cert. denied*, 495 U.S. 959 (1990); *Phelps v. Duckworth*, 772 F.2d 1410, 1418 (7th Cir. 1985) (en banc) (Posner, J., concurring) (noting "*Doyle* . . . depends just on *Miranda*"), *cert. denied*, 474 U.S. 1011 (1985); Note, *Protecting* Doyle *Rights After* Anderson v. Charles*: The Problem of Partial Silence*, 69 Va. L. Rev. 155, 164 (1983) [hereinafter *Protecting* Doyle *Rights*] (describing *Miranda* warnings as the *sine qua non* of any *Doyle* inquiry); *see also Doyle*, 426 U.S. at 617 (concluding "the *Miranda* decision compels rejection of the State's position" to permit use of post-arrest silence for impeachment purposes).

Silence in other contexts lacking the *Miranda* warnings may be used as evidence. *See, e.g., South Dakota v. Neville*, 459 U.S. 553, 564-65 (1983) (refusal to submit to blood-alcohol test may be used as evidence and is distinguishable from *Doyle*); *Jenkins v. Anderson*, 447 U.S. 231, 240 (1980) (pre-*Miranda* silence may be used for impeachment since "no governmental action induced petitioner to remain silent before arrest"); *Roberts v. United States*, 445 U.S. 552, 561 (1980) (holding "the post-conviction, presentencing silence of the defendant did not resemble 'postarrest silence that may be induced by the assurances contained in *Miranda* warnings' ") (as quoted in *Fletcher*, 455 U.S. at 606).

Some commentators have suggested any insoluble ambiguity implied by *Miranda* warnings could be cured by modifying the warnings. *See, e.g., The Law of Pretrial Interrogation*, 22 U. Mich. J. L. Ref. 437, 530 & n.273, 555, 563 (1989) [hereinafter *Pretrial Interrogation*]; *Adverse Inferences From Silence*, 22 U. Mich. J. L. Ref. 1005, 1116 & n.317 (1989) [hereinafter *Adverse Inferences*]; *Protecting* Doyle *Rights*, *supra*, at 162 n.38; *The Supreme Court, 1979 Term*, 94 Harv. L. Rev. 75, 86 (1980) [hereinafter *1979 Term*] (discussing possible "silence warning").

It is true that *Doyle* relies upon the Fourteenth Amendment – a separate constitutional basis than that supporting the *Miranda* rule. *See, e.g., Wainwright*, 474 U.S. at 291. Yet as this Court has observed with regard to

the *Doyle* rule, " 'absen[t] the sort of affirmative assurances embodied in the *Miranda* warnings,' the Constitution does not prohibit the use of a defendant's postarrest silence to impeach him at trial." *Greer*, 483 U.S. at 763 (quoting *Fletcher*, 455 U.S. at 607); *see also Wainwright*, 474 U.S. at 291 n.6 (citing cases to show that the existence of *Doyle* is based wholly upon *Miranda*). Therefore, if *Doyle* may be deemed a personal constitutional right at all, it must be as a derivative to the *Miranda* rule. However, it is well-recognized that the judicially established, prophylactic *Miranda* rule is not compelled by the Fifth Amendment. In other words, the mere failure to comply with the *Miranda* requirements does not automatically establish a violation of the Fifth Amendment.[3] Moreover, this Court has already noted that *Doyle* is not predicated on the Fifth Amendment.[4] Just as the Fourth Amendment

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[3] *See, e.g., Oregon v. Elstad*, 470 U.S. 298, 306 (1985) ("The *Miranda* exclusionary rule . . . serves the Fifth Amendment and sweeps more broadly than the Fifth Amendment itself. It may be triggered even in the absence of a Fifth Amendment violation."); *see also Duckworth*, 492 U.S. at 209 (O'Connor, J., concurring) ("The *Miranda* rule is not, nor did it ever claim to be, a dictate of the Fifth Amendment itself."); *New York v. Quarles*, 467 U.S. 649, 654 (1983); *Doyle*, 426 U.S. at 617 (noting the *Miranda* warnings are "a prophylactic means of safeguarding Fifth Amendment rights"); *Michigan v. Tucker*, 417 U.S. 433, 444-46 (1974); *Brecht*, 944 F.2d at 1370 ("[T]he warnings required by *Miranda* are not themselves part of the Constitution."); *United States ex rel. Miller v. Greer*, 789 F.2d 438, 449 (7th Cir. 1986) (en banc) (Easterbrook, J., dissenting) (same), *rev'd on other grounds*, 483 U.S. 756 (1987).

[4] *See Wainwright*, 474 U.S. at 291 n.7; *see also Doyle*, 426 U.S. at 618; *Brecht*, 944 F.2d at 1368; *Phelps*, 772 F.2d at 1422 (Easterbrook, J., concurring) ("[A] prosecutor's thwarted effort to violate *Doyle* is removed three times from the constitutional

exclusionary rule and *Miranda* exclusionary rule are not *mandated* by the Constitution, *Doyle* similarly is not *dictated* by the Constitution.

Clearly, then, the *Doyle* rule is not a personal constitutional right, within the meaning of *Stone*.[5] Consequently, *Doyle* claims arguably fail to meet the jurisdictional prerequisite for federal habeas review. In asserting claims based upon the prophylactic judge-made *Doyle* rule, state prisoners cannot establish that their "custody" is a result of a "violation of the *Constitution* or laws or treaties of the United States." 28 U.S.C. § 2254(a) (emphasis added); *see also Phelps*, 772 F.2d at 1416 (Posner, J., concurring) ("The chain is too long and has too many weak links to provide a firm basis for federal judicial intervention in the criminal process of the states in [such *Doyle*] case[s]. . . . "); *accord Estelle v. McGuire*, 502 U.S. ___, 112 S.Ct. 475, 116 L.Ed.2d 385, 396 (1991) ("In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States.").

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prohibition of compulsory self-incrimination."); *accord Jenkins*, 447 U.S. at 236-37 (noting *Raffel v. United States*, 271 U.S. 494 (1926) "explicitly rejected the contention that the possibility of impeachment by prior silence is an impermissible burden upon the exercise of Fifth Amendment rights.").

[5] At least one court has intimated that the *Doyle* rule is a personal constitutional right. But this proposition was reached in a conclusory manner, failing to undertake the analysis applied in *Stone* to the analogous prophylactic, judge-made Fourth Amendment exclusionary rule. *See Miller*, 789 F.2d at 445 (suggesting, without analysis or explanation, a *Doyle* violation "is constitutional and personal to the petitioner"), *rev'd on other grounds*, 483 U.S. 756 (1987).

B. Any Incremental Benefits of Reviewing *Doyle* Claims On Collateral Review Are Outweighed by Substantial Costs to our Criminal Justice System

In applying the *Stone* rationale, to determine whether federal habeas review should be available for *Doyle* claims, the utility of the rule must be weighed against the costs of extending it to collateral review. *See Stone*, 428 U.S. at 489; *see also Duckworth*, 492 U.S. at 208 (O'Connor, J., concurring). Stated another way, the issue is whether *Doyle* claims should be permitted as a collateral challenge to a presumptively final and valid state court judgment, *see Barefoot v. Estelle*, 463 U.S. 880, 887 (1983), when there has *already* been a full and fair opportunity to litigate the claim on direct review.

1. Fairness Function

The principle objective of *Doyle* is fairness. The *Doyle* rule precludes any fundamental unfairness that *may* result when a prosecutor uses a defendant's silence as evidence after the defendant received the implicit assurance of the *Miranda* warning that the exercise of silence would not be punished. *See, e.g., Wainwright*, 474 U.S. at 289-90, 292; *Doyle*, 426 U.S. at 618; *see also Brecht*, 944 F.2d at 1370 (The *Doyle* rule "has nothing to do with the defendant's guilt and everything to do with insisting that the government play straight with those it prosecutes."); *Miller*, 789 F.2d at 449 & n.2 (Easterbrook, J., dissenting) (same).

Significantly, the fairness function of *Doyle* is adequately promoted and satisfied under the direct review process. During the state trial – traditionally considered

the "main event" in our criminal justice system, *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977) – any prosecutorial effort to impeach a defendant with his post-*Miranda* silence or call attention to this silence may be challenged or mitigated in several manners by defense counsel. This includes: (1) a motion for a mistrial; (2) an immediate objection which may preclude the submission of any post-*Miranda* silence evidence to the jury, *see, e.g., Greer*, 483 U.S. at 764-65; or (3) a curative instruction. *See id.* at 766 n.8 (noting "trial counsel bore primary responsibility for ensuring that the [attempted *Doyle*] error was cured in the manner most advantageous to his client"); *see also Miller*, 789 F.2d at 449 & n.2 (Easterbrook, J., dissenting) (noting curative role that defense counsel may play).[6] As a first line of defense, any of these recognized avenues, if pursued, will be subject to resolution by the trial judge. Even where there is no technical *Doyle* violation, the prosecutor's actions might be scrutinized under the Due Process Clause on grounds of prosecutorial misconduct. *See, e.g., Greer*, 483 U.S. at 765-67.

On appeal, the fairness function is further promoted on several potential levels, as the entire trial record may be examined and reexamined. *First*, the appellate court will determine whether a *Doyle* violation in fact occurred. If so, then the appellate court will decide whether the error constitutes harmless error under the standard established in *Chapman v. California*, 386 U.S. 18 (1967). Significantly, under the *Chapman* standard, the State bears the

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[6] Where a *Doyle* objection is not raised, review in federal court on federal cases is under the plain error standard. *See, e.g., United States v. Carter*, 953 F.2d 1449, 1466 (5th Cir.), *cert. denied*, 112 S.Ct. 2980, 119 L.Ed.2d 598 (1992); *United States v. Cardenas Alvarado*, 806 F.2d 566, 573 (5th Cir. 1986).

burden to show "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id.* at 24.[7] *Second*, any ruling by an intermediate appellate state court, as here, may be reviewed by the state's highest court, entailing the same two-step process.[8] *Finally*, any ruling by the state supreme court may be subject to direct review by this Court. *See* 28 U.S.C. § 1257 (appellate jurisdiction over cases arising in state court). In fact, many of the *Doyle* line of cases have been established by this Court on direct review.

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[7] The *Chapman* standard also applies to Fourth Amendment exclusionary rule and *Miranda* exclusionary rule claims considered on direct review. *See, e.g., United States v. Modarressi*, 886 F.2d 6, 7-8 (1st Cir. 1989) (*Chapman* standard applied to alleged Fourth Amendment claim); *United States v. Chapman*, 866 F.2d 1326, 1334-35 (11th Cir.) (same), *cert. denied*, 493 U.S. 932 (1989); *United States v. Troise*, 796 F.2d 310, 314 (9th Cir. 1986) (*Chapman* standard applied to alleged *Miranda* violation); *People v. Ratliff*, 41 Cal.3d 675, 688, 224 Cal.Rptr. 705 (Cal.1986) (*Chapman* standard applied to alleged Fourth Amendment claim); *People v. Enriquez*, 19 Cal.3d 221, 239, 137 Cal.Rptr. 171 (Cal.1977) (*Chapman* standard applied to *Miranda* violation).

[8] This multi-level state judicial review comports with the primary role of state courts in our federal criminal justice system and their co-equal status and ability with the federal judiciary to apply federal principles. *See Sawyer v. Smith*, 497 U.S. 227, ___, 110 S.Ct. 2822, 2831, 111 L.Ed.2d 193, 210-11 (1990); *Swain v. Pressley*, 430 U.S. 372, 383 (1977); *Stone*, 428 U.S. at 493 n.35; *see also Rose v. Mitchell*, 443 U.S. 545, 579-80 (1979) (Powell, J., concurring); *Palmore v. United States*, 411 U.S. 389, 407, 410 (1973); Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 451, 509 (1963) [hereinafter Bator, *Finality in Criminal Law*]. It is well-recognized that the primary obligation for the definition and enforcement of criminal laws in our federalism form of government resides with the States. *See Engle v. Isaac*, 456 U.S. 107, 128 (1982); *Palmore*, 411 U.S. at 402.

The record shows that petitioner Brecht received a full and fair hearing of his *Doyle* claims before the state trial, appellate and supreme courts. Moreover, these claims were fully examined and assessed on direct review under the harmless error analysis. Relitigation of this issue on collateral review comes at a substantial price and cannot be justified in terms of any incremental benefit obtained by advancing the fairness function through, as here, three more duplicative rounds of litigation on federal habeas review.

2. Impact on Truth-Seeking Process

Another concern noted by the *Stone* Court was the impact of the Fourth Amendment exclusionary rule on the truth-finding process. *Stone*, 428 U.S. at 490. As applied to *Doyle*, the issue is whether the application of the rule on collateral review contributes if at all to the truth-seeking process. First, we must consider whether there is any probative utility from using post-*Miranda* silence.

Common law has long recognized the probative value of impeaching an individual by their silence.[9] The prophylactic *Doyle* rule does not apply until *Miranda* warnings are given, usually following an arrest. However, subsequent cases have recognized several qualifications to the *Doyle* rule, thereby *acknowledging the legitimate evidentiary use of silence in many similar contexts*. For example, *prearrest* silence may constitutionally be used for impeachment purposes. *See Fletcher*, 455

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[9] *See Jenkins*, 447 U.S. at 239; *see also Fletcher*, 455 U.S. at 607 (noting state evidentiary law may govern the ability of prosecutors to comment on postarrest, pre-*Miranda* silence); *Jenkins*, 447 U.S. at 239 n.5 (noting probative role of prearrest silence "is a question of state evidentiary law"); *Raffel v. United States*, 271 U.S. 494 (1926) (impeachment of silence at prior trial permitted in second trial); *cf. Neville*, 459 U.S. at 564-65 (refusal to submit to blood-alcohol test may be used as probative evidence).

U.S. at 604 n.1; *Jenkins*, 447 U.S. at 240; *see also Stubbs*, 944 F.2d at 834 n.1.[10]

As to *postarrest* silence, *Doyle* does not establish an automatic or absolute rule precluding every reference to such silence. For example, where an arrest has been made but no *Miranda* warnings have been given, no governmental inducement or assurance has been afforded the defendant that postarrest silence will be protected and a defendant who chooses to testify may be cross-examined on the postarrest silence. *Fletcher*, 455 U.S. at 606-07; *see also Roberts*, 445 U.S. at 561; *Raffel*, 271 U.S. at 496-97. Even *Doyle* recognized that postarrest silence may be used "to challenge the defendant's testimony as to his behavior following arrest."[11] Prosecutors

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[10] This Court has considered and rejected the argument that "an arrest, by itself, is governmental action which implicitly induces a defendant to remain silent." *Fletcher*, 455 U.S. at 606.

Although many cases discuss the *Doyle* rule in the context of "prearrest" and "postarrest," *Doyle* unquestionably rests on the implied assurance of the *Miranda* warning. *See* note 2, *supra*, and accompanying text. In light of this precedent, acknowledging the dispositive role of the implied assurance of *Miranda* warnings on *Doyle* claims, it would be more accurate to refer to "pre-*Miranda* and "post-*Miranda*" silence.

As this Court has explained, post-*Miranda* silence "does not mean only muteness; it includes the statement of a desire to remain silent, as well as of a desire to remain silent until an attorney has been consulted." *Wainwright*, 474 U.S. at 295 n.13.

[11] *Doyle*, 426 U.S. at 619 n.11 (noting "the fact of post-arrest silence could be used by the prosecution to contradict a defendant who testifies to an exculpatory version of events and claims to have told the police the same version upon arrest"); *see also Leecan v. Lopes*, 893 F.2d 1434, 1441-42 (2d Cir.) (*Doyle* footnote 11 exception found applicable), *cert. denied*, 496 U.S. 929 (1990); *Nichols v. Wainwright*, 783 F.2d 1540, 1543 (11th Cir.) (same), *cert. denied*, 479 U.S. 840 (1986).

may use postarrest silence which "merely inquires into prior inconsistent statements."[12]

While *Doyle* "bars the *use* for impeachment purposes' of a defendant's postarrest silence," there is no *Doyle* violation where the prosecutor is not permitted to call attention to the silence or use the silence for impeachment purposes. *Greer*, 483 U.S. at 763, 764 (emphasis in original).[13] Finally, in some situations, questions may be "carefully framed" to avoid reference to the exercise of silence while permitting other evidentiary objectives to be pursued. *Wainwright*, 474 U.S. at 295.

Even prior to these clarifications and qualifications of the *Doyle* rule, this Court explicitly noted in *Doyle* that it was not "necessary . . . to express an opinion on the

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[12] *Anderson v. Charles*, 447 U.S. 404, 408 (1980) (per curiam) ("[A] defendant who voluntarily speaks after receiving *Miranda* warnings has not been induced to remain silent. As to the subject matter of his statements, the defendant has not remained silent at all."); *see also United States v. Diaz*, 961 F.2d 1417, 1418-19 (9th Cir. 1992) (applying *Anderson* rule); *Smith v. Cadagin*, 902 F.2d 553, 558-59 (7th Cir.) (same), *cert. denied*, 111 S.Ct. 177, 112 L.Ed.2d 141 (1990).

Others have also noted that silence may constitute a prior inconsistent statement. *Doyle*, 426 U.S. at 622 (Stevens, J., dissenting); *see also Miller*, 789 F.2d at 449-51 (Easterbrook, J., dissenting); *accord Jenkins*, 447 U.S. at 245 n.8.

[13] *See also Stubbs*, 944 F.2d at 834-35 (holding no *Doyle* violation occurred under the *Greer* standard); *Lindgren v. Lane*, 925 F.2d 198, 200-01 (7th Cir.) (same), *cert. denied*, 112 S.Ct. 105, 116 L.Ed.2d 74 (1991); *United States v. Ramos*, 932 F.2d 611, 617 n.10 (7th Cir. 1991) (same); *United States v. Lane*, 883 F.2d 1484, 1494-95 (10th Cir. 1989) (same), *cert. denied*, 493 U.S. 1059 (1990); *accord Wainwright*, 474 U.S. at 295 ("What is impermissible is the *evidentiary use* of an individual's exercise of his constitutional rights after the State's assurance that the invocation of those rights will not be penalized.") (emphasis added).

probative value for impeachment purposes of petitioners' [post-*Miranda*] silence." *Doyle*, 426 U.S. at 618 n.8.[14] More recently, this Court has observed, in apparent agreement

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[14] Some cases have questioned the probative role of post-*Miranda* silence under the *Doyle* rule. *See, e.g., Bass v. Nix*, 909 F.2d 297, 305 n.14 (8th Cir. 1990) (noting that "the *Doyle* rule is, at its heart, concerned with the ability of the adversarial system to find the truth" and concluding that the harmless-beyond-a-reasonable doubt standard should apply on collateral review); *Miller*, 789 F.2d at 444 n.4 ("Silence after a state authority has promised that any statement one makes may be used at trial surely has questionable probative value."); *Phelphs v. Duckworth*, 757 F.2d 811, 819 (7th Cir.), *vacated*, 772 F.2d 1410 (7th Cir. 1985) (en banc), *cert. denied*, 474 U.S. 1011 (1985); *accord United States v. Hale*, 422 U.S. 171, 177 (1975) (pre-*Doyle* case based upon supervisory authority over lower federal courts). However, these cases have not taken into account the more recent decisions of this Court, as recognized by others. *See* note 15, *infra*; *see also Brecht*, 944 F.2d at 1376 (criticizing *Bass* as "rest[ing] on a misunderstanding of the justification of the *Doyle* rule").

The doubt on the probative utility of post-*Miranda* silence was initially predicated upon the divergent possible constructions of this silence. In *Doyle*, 426 U.S. at 617, this Court noted that "every post-arrest silence is insolubly ambiguous because of what the State is required to advise the person arrested." *Cf. Hale*, 422 U.S. at 180 (supervisory authority over lower federal courts).

Others have taken strong exception. *See, e.g., Doyle*, 426 U.S. at 621-26 (Stevens, J., dissenting) (noting the mere giving of a *Miranda* warning does not "lessen[] the probative value" of silence at the time of arrest); *Hale*, 422 U.S. at 181 (Burger, C.J., concurring); *Brecht*, 944 F.2d at 1369 ("That silence can carry multiple messages does not make the ambiguity *insoluble*. Few pieces of evidence standing alone support confident conclusions.") (emphasis in original); *Phelps*, 772 F.2d at 1416 (Posner,

with others, that any probative basis under *Doyle* and its progeny is *secondary* to the fairness function (under the implied assurance rationale).[15]

Even assuming *arguendo* that any probative rationale which may have originally supported the *Doyle* rule survives today, the critical question is whether any incremental benefit from relitigation of a *Doyle* claim on collateral review can be justified in light of the substantial costs entailed by this review. As already noted, the direct review process furnishes ample opportunity to litigate these issues. There certainly are diminishing returns to applying a prophylactic judge-made rule on collateral review when the issue has already been fully and fairly considered on direct review.

Moreover, where habeas relief is granted, the outcome and accuracy of a second state trial may turn on the reliability and availability of any remaining evidence. As Justice Harlan wrote, the "very act of trying stale facts may

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J., concurring); *Pretrial Interrogation*, *supra* note 2, at 561-63; *Adverse Inferences*, *supra* note 2, at 1061-62, 1068-78, 1086-89.

It should be acknowledged that any doubts over the probative utility of post-*Miranda* silence are entirely predicated on a *presumption* that the silence was induced by reliance on the *Miranda* warning. Justice Stevens recognized this in *Doyle* and concluded that such a presumption was not necessary since the defendant, on cross-examination, has the opportunity to explain whether the silence was induced by the *Miranda* warning. *See Doyle*, 426 U.S. at 624-26 (Stevens, J., dissenting).

[15] *See Wainwright*, 474 U.S. at 294 n.12. It is now widely recognized that subsequent decisions of this Court have reduced or eliminated any force that any probativeness rationale may have initially had. *See, e.g., Miller*, 789 F.2d at 451 (Easterbrook, J., dissenting); *Phelps*, 772 F.2d at 1422 (Easterbrook, J., concurring); *Protecting* Doyle *Rights*, *supra* note 2, at 167 nn. 37 & 38, 165 n.56; *1979 Term*, *supra* note 2, at 86; *see also Brecht*, 944 F.2d at 1368.

well, ironically, produce a second trial no more reliable as a matter of getting at the truth than the first." *Mackey v. United States*, 401 U.S. 667, 691 (1971) (Harlan, J., concurring and dissenting); *see also McCleskey v. Zant*, 499 U.S. ___, 111 S.Ct. 1454, 1468, 113 L.Ed.2d 517, 542 (1991); Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 147 (1970) [hereinafter Friendly, *Is Innocence Irrelevant?*]. The potential problem of "stale" facts is a real one in this case. The shooting in issue occurred nearly seven years ago, on October 17, 1985.[16]

In sum, it is clear that any prosecutor who flirts with a *Doyle* error incurs a real and substantial risk of losing a possible conviction. Not only are there several avenues available to defense counsel to attempt to cure or challenge any alleged *Doyle* violation, but there are also multiple opportunities for thorough judicial scrutiny during the direct review process, including to this Court. If a *Doyle* violation is established, the State then holds the burden, under the *Chapman* standard, to show "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman*, 386 U.S. at 24. Against this background, *Amici* respectfully submit that the dispositive question for petitioner to answer here is how the administration of justice is advanced by a new and duplicative round of *Doyle* litigation on federal habeas review and at what price to other important criminal justice values.

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[16] The primary objective of the *Miranda* exclusionary rule is to deter police conduct that may lead to a potential constitutional violation. *See, e.g., Elstad*, 470 U.S. at 308; *Oregon v. Haas*, 420 U.S. 714, 722-23 (1975); *Tucker*, 417 U.S. at 446-47. While *Doyle* safeguards the *Miranda* rule, *Doyle* cannot be said to *directly* promote the central purpose of the *Miranda* rule. *Miranda* deals with police conduct *before* trial; *Doyle* focuses on prosecutorial conduct *at* trial.

3. The Substantial Costs of Habeas Review

This Court has already noted the substantial, and often necessary, costs of relitigation during the direct review process.[17] Application of the *Chapman* harmless error standard already constitutes an acknowledgment that even on direct review not all *Doyle* errors should result in reversal of conviction. *See also* note 6, *supra* (discussing plain error rule). Yet, harmless error review also entails its own necessary costs, including scrutiny of

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[17] In the context of harmless error analysis, this Court has observed:

> The reversal of a conviction entails substantial social costs: it forces jurors, witnesses, courts, the prosecution, and the defendants to expend further time, energy, and other resources to repeat a trial that has already once taken place; victims may be asked to relive their disturbing experiences. The passage of time, erosion of memory, and dispersion of witnesses may render retrial difficult, even impossible. Thus, while reversal may, in theory, entitle the defendant only to retrial, in practice it may reward the accused with complete freedom from prosecution, and thereby cost society the right to punish admitted offenders. Even if a defendant is convicted in a second trial, the intervening delay may compromise society's interest in the prompt administration of justice, and impede accomplishment of the objectives of deterrence and rehabilitation. These societal costs of reversal and retrial are an acceptable and often necessary consequence when an error in the first proceeding has deprived a defendant of a fair determination of the issue of guilt or innocence. But the balance of interest tips decidedly the other way when an error has had no effect on the outcome of the trial.

United States v. Mechanik, 475 U.S. 66, 72 (1986) (citations and internal quotations omitted).

the entire record and the possibility of undermining the jury's role during the "main event."

These costs are essential to the fairness and accuracy of the direct review process. However, these same costs are multiplied manifold by *duplicative* proceedings on collateral review, where a presumptively valid and final state court judgment is being challenged. *Barefoot*, 463 U.S. at 887. Moreover, once a presumptively valid state court judgment has been entered, *separate* criminal justice values and interests must be taken into account in considering the proper scope of collateral review in our federalism system. *See, e.g., Duckworth*, 492 U.S. at 209-10 (O'Connor, J., concurring) ("While this balance of interests may be perfectly justified in the context of direct review of criminal convictions, . . . the balance shifts when applied to a presumptively final criminal judgment which is collaterally attacked in a federal habeas corpus proceeding.").

As this Court has aptly recognized, "*most of the price* paid for federal review of state prisoner claims is *paid by the States*," *Coleman v. Thompson*, 501 U.S. ___, 111 S.Ct. 2546, 2559, 115 L.Ed.2d 640 (1991) (emphasis added). Some of the significant costs of habeas review include: the record or practice of some federal habeas courts to disregard or disrespect the co-equal status of state courts, their ability to apply the *Doyle* rule, and the state court's rulings; an intrusion into matters of State sovereignty and a disregard of comity interests;[18] an unnecessary

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[18] *See, e.g., McCleskey*, 499 U.S. at ___, 111 S.Ct. at 1469, 113 L.Ed.2d at 543 (discussing intrusion into state sovereignty interests); *Teague v. Lane*, 489 U.S. 288, 309 (1989) (plurality opinion); *Rose v. Lundy*, 455 U.S. 509, 518-19 (1982) (noting comity interest); *Stone*, 428 U.S. at 491 n.31; *see also* note 8, *supra* (discussing primary role of state courts in our national judicial system).

consumption of limited judicial resources;[19] a lack of repose in the enforcement of presumptively valid state court convictions;[20] and an undermining of public confidence in the ability of our criminal justice system to resolve primary criminal justice disputes.[21] Not only does relitigation of the prophylactic *Doyle* rule on federal habeas review come at a substantial and unjustifiable cost

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[19] *See, e.g., Keeney v. Tamayo-Reyes*, 112 S.Ct. 1715, 1719, 118 L.Ed.2d 318, 329 (1992); *McCleskey*, 113 L.Ed.2d at 543 (noting "heavy burden on scarce federal judicial resources" which impacts the ability "of the system to resolve primary disputes"); *Stone*, 428 U.S. at 491 n.31 (noting impact of habeas review on "the most effective utilization of limited judicial services"); *Schneckloth v. Bustamonte*, 412 U.S. 218, 261 (1973) (Powell, J., concurring) ("After all, the resources of our system are finite: their overextension jeopardizes the care and quality essential to fair adjudication.").

[20] *See, e.g., McCleskey*, 499 U.S. ___, 111 S.Ct. at 1468, 113 L.Ed.2d at 542 ("Neither innocence nor just punishment can be vindicated until the final judgment is known."); *see also Teague*, 489 U.S. at 309; *Stone*, 428 U.S. at 491 n.31; *Mackey*, 401 U.S. at 690-91 (Harlan, J., concurring and dissenting); Friendly, *Is Innocence Irrelevant?*, at 147; Bator, *Finality in Criminal Law, supra* note 8, at 450-51.

[21] Each of these criminal justice costs in the context of collateral review is fully considered in the Brief *Amicus Curiae* of States in Support of Petitioner, *Withrow v. Williams*, No. 91-1030, at 12-22, and will not be repeated here. *See also Brecht*, 944 F.2d at 1373 (noting costs of collateral review of *Doyle* claims, including the criminal justice interests in federalism and finality; delay caused by a new trial; and use of limited federal judicial resources).

but it also entails diminishing returns to the primary fairness objective. *See, e.g., Brecht*, 944 F.2d at 1374 (noting "the marginal benefits and costs of enforcement" of the *Doyle* rule on federal habeas review); *see also Miller*, 789 F.2d at 450 (Easterbrook, J., dissenting) ("The enforcement of prophylactic rules [such as *Doyle*] is a matter of costs and benefits."). In light of the remoteness in time in applying the *Doyle* rule on collateral review from the underlying events in issue, any grant of relief on habeas review will be seen more as a stroke of "lightening" and will be unlikely to influence state policy or prosecutorial conduct. *See Duckworth*, 492 U.S. at 211 (O'Connor, J., concurring); *Miller*, 789 F.2d at 452 (Easterbrook, J., dissenting).

"As in the case of any remedial device, 'the application of the rule [should be] restricted to those areas where its remedial objectives are thought most efficaciously served.' " *Stone*, 428 U.S. at 486-87 (quoting *United States v. Calandra*, 414 U.S. 338, 348 (1974)). The Fourth Amendment exclusionary rule under *Stone*, just like the *Miranda* exclusionary rule and the *Doyle* rule, are all prophylactic, judicially created remedies. Each rule is exclusionary in that it precludes the admission of certain evidence. Each of these rules should be vigorously enforced on direct review; the cost of their application on collateral review, however, cannot be justified. For these reasons, the *Stone v. Powell* standard and rationale best balance the competing criminal justice interests at stake and minimize the costs to our criminal justice system of relitigating *Doyle* claims on collateral review.

III. *Doyle* Error Should Result In Reversal Of A State Criminal Conviction On Federal Habeas Corpus Only If The Petitioner Can Demonstrate A Reasonable Probability Of A More Favorable Result Had The Evidence Been Excluded

Assuming the Court does not accept, or does not reach, our argument that *Doyle* violations should not be cognizable on habeas corpus, it must then decide the appropriate standard of review for such errors. The Wisconsin Supreme Court found that the *Doyle* error was harmless beyond a reasonable doubt. *Brecht*, 143 Wis.2d 297, 421 N.W.2d at 104. The district court relied upon the same standard, but found the error prejudicial. *Brecht*, 759 F.Supp. at 507-508. The Seventh Circuit concluded that the reasonable doubt standard of *Chapman v. California*, 386 U.S. 18 (1967), should not be applied to collateral review of *Doyle* claims, choosing instead to focus on "whether the error 'had substantial and injurious effect or influence in determining the jury's verdict.' " *Brecht*, 944 F.2d at 1375 (citation omitted). Although we agree with the circuit court that *Chapman* should not apply to review of *Doyle* claims on habeas corpus, *amici* believe that no form of "harmless error" analysis is appropriate. Rather, we submit that *Doyle* error is reversible only if there is a reasonable probability that, had the evidence been excluded, the result of the proceeding would have been different. *Cf. Greer*, 483 U.S. at 767-769 (Stevens, J., concurring in judgment) (concluding on direct appeal *Doyle* error should be tested under the *Chapman* standard; collateral review should determine only whether trial was fundamentally fair despite the error).[22]

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[22] The Court granted certiorari in *Greer* to decide this precise issue, 483 U.S. at 761 n.3, but found it unnecessary to do so

In *Doyle* the Court held that it would be "fundamentally unfair and a deprivation of due process" to allow a defendant's silence to be used against him after he had been advised of his *Miranda* rights and impliedly assured that his silence could not be used against him. 426 U.S. at 618. As emphasized in subsequent cases, impeachment with post-*Miranda* silence "is an affront to the fundamental fairness that the Due Process Clause requires." *Wainwright*, 474 U.S. at 291. Thus it is clearly not the use of the defendant's *silence* which is unfair, but only the manner in which that silence was induced. *See Brecht*, 944 F.2d at 1369-70.

A criminal defendant is denied due process by a trial court's "failure to observe that fundamental fairness essential to the very concept of justice." *Lisenba v. California*, 314 U.S. 219, 236 (1941). When attempting to define fundamental fairness, however, "constitutional line drawing . . . is necessarily imprecise." *Donnelly v. DeCristoforo*, 416 U.S. 637, 645 (1974). The Court has nevertheless emphasized that alleged due process violations are not reviewed under a harmless error analysis. *Darden v. Wainwright*, 477 U.S. 168, 183, n.15 (1986). Rather, the question of error subsumes the question of prejudice. If the defendant's trial was fundamentally unfair, he was necessarily prejudiced and is thus entitled to a new trial. Similarly, even if errors occurred, if the trial as a whole was fair, the conviction should be affirmed. *See United States v. Agurs*, 427 U.S. 97, 112-113 (1976). While the fundamental fairness inquiry under the Due Process Clause is less

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when it determined that there were no *Doyle* violations. *Id.* at 764-65 & n.6. While we necessarily focus on collateral review, the test we propose reasonably should apply on direct review as well. That issue, however, is not before the Court and need not be decided in this case.

"demanding" than the harmless-error standard of *Chapman*, *see Greer*, 483 U.S. at 765 n.7, the Court has yet to provide a test for determining when due process has been violated. Recent decisions suggest an appropriate formulation.

The "central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence." *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986). Thus, the Court's "cases have moved in the direction of reaffirming the relevance of the likely accuracy of convictions in determining the available scope of habeas review." *Teague*, 489 U.S. at 313; *see also Murray v. Carrier*, 477 U.S. 478 (1986) (a showing of factual innocence may allow review of an otherwise defaulted claim); *Strickland v. Washington*, 466 U.S. 668 (1984) (a defendant is prejudiced by ineffective counsel only if the attorney's actions undermine the reliability of the judgment); *United States v. Valenzuela-Bernal*, 458 U.S. 858, 873-874 (1982) (deportation of potential defense witnesses will not violate due process unless there is a reasonable likelihood that the witness could have affected the judgment of the trier of fact); *Manson v. Brathwaite*, 432 U.S. 98 (1977) (a suggestive identification procedure will not violate due process unless the identification is unreliable); *Agurs*, 427 U.S. at 112 (the materiality of evidence which prosecution should have disclosed must reflect the Court's "overriding concern with the justice of the finding of guilt").

Based upon its concern for the reliability of the trial, the Court developed a test for determining the materiality of evidence which should have been disclosed by the prosecutor pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963). Such evidence is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have

been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *United States v. Bagley*, 473 U.S. 667, 682, 685 (1985) (Blackman, J. and White, J., concurring in part and concurring in the judgment); *accord Pennsylvania v. Ritchie*, 480 U.S. 39, 57 (1987). The *Bagley* test was built upon a series of cases, most of which dealt exclusively with due process violations, and all of which were concerned with the reliability of the trial.

The Court first considered the appropriate test for reviewing *Brady* violations in *Agurs*.[23] Omitted evidence could be considered material, and thus subject to disclosure, only if it created a reasonable doubt about guilt. 427 U.S. at 112-113. This test emphasized the Court's focus on the fairness of the defendant's trial. *Id.* at 108.

The fairness of the trial was again highlighted in *Valenzuela-Bernal*, another Fifth Amendment due process case. The Court held that the government's deportation of a potential defense witness would justify sanctions "only if there is a reasonable likelihood that the testimony could have affected the judgment of the trier of fact." 458 U.S. at 874. Such an evaluation is best made in light of the entire trial record. *Id.* & n.10 (citing *Agurs*).

The key to both *Agurs* and *Valenzuela-Bernal* was concern for the reliability of the trial result. The Court subsequently explained that the Sixth Amendment guarantee of counsel was premised on the same concern. As a result, any claim of ineffective assistance of counsel requires a showing of prejudice. *See, e.g., Strickland*, 466

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[23] Although *Agurs* was based upon the Due Process Clause of the Fifth Amendment, the Court expressly extended its holding "to the comparable clause in the Fourteenth Amendment applicable to trials in state courts." 427 U.S. at 107.

U.S. at 694. "[T]he appropriate test for prejudice finds its roots in" *Agurs* and *Valenzuela-Bernal*. Thus, the defendant must show a reasonable probability of a more favorable result absent counsel's errors. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

The Court found the "*Strickland* formulation of the *Agurs* test . . . sufficiently flexible" to cover every type of nondisclosure by the prosecutor, and adopted that test in *Bagley*, 473 U.S. at 682. *Amici* submit that this established test also contains sufficient flexibility to cover *Doyle* violations and urge its adoption in this case. Unless a reasonable probability appears that the petitioner would have received a more favorable result absent admission of the *Doyle* evidence, the outcome was reliable and he was not denied a fundamentally fair trial.

Reliance upon the "reasonable probability" test for determining the fairness of a trial is preferable to harmless error analysis, even that proposed by the Seventh Circuit. The test *amici* suggest is consistent with the approach followed by this Court in its recent due process cases. While "line drawing" and "precision" may be difficult in this area, the analysis *amici* propose is one with which the lower federal courts are already familiar. Its adoption thus permits habeas cases to be handled more expeditiously and with greater uniformity, all of which further ensures respect for the finality and presumptive correctness of state criminal convictions.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the decision of the court below be affirmed.

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